Nos. 90-1419, 90-1769

Supreme Court, U.S.
FILED
NOV 21 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,
Respondents.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

BOSTON and MAINE CORPORATION, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF PETITIONERS NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.

LOUIS R. COHEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

STEPHEN C. ROGERS
FREDERICK C. OHLY
NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 906-3985

ROBERT P. VOM EIGEN,
Counsel of Record
CHARLES I. APPLER
THEODORE A. HOWARD
RICHARD F. RILEY, JR.
HOPKINS & SUTTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

Counsel for Petitioners

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Upon review of a final decision of the Interstate Commerce Commission granting the application of petitioner National Railroad Passenger Corporation ("Amtrak") for a conveyance of rail property under Section 402(d) of the Rail Passenger Service Act, 45 U.S.C. § 562(d), the court of appeals rejected the Commission's interpretation of Section 402(d), substituted its own interpretation, and vacated the Commission's order. While petitions for rehearing were pending, Congress enacted an amendment, specifically applicable to pending cases, to correct the erroneous reading of the statute by the court. However, the court of appeals denied rehearing, declaring that its interpretation was not affected by the amendment.

The questions presented are:

1. Did the court of appeals violate the principles of judicial review established in this Court's *Chevron* decision when it substituted its interpretation of Section 402(d) for the interpretation adopted by the Commission?
2. Did the court of appeals improperly disregard the clear will of Congress when it declared that its interpretation of Section 402(d) was not affected by the amendment to the statute?
3. Should the Commission's orders directing conveyance of a segment of the Connecticut River Line to Amtrak upon payment of just compensation and authorizing reconveyance thereof to the Central Vermont Railway have been upheld by the court of appeals?

PARTIES TO THE PROCEEDING

Petitioners are the National Railroad Passenger Corporation ("Amtrak") and Central Vermont Railway, Inc. ("Central Vermont"). Respondent is the Boston and Maine Corporation ("B&M").*

In addition to the Interstate Commerce Commission and the United States of America, the petitioners in No. 90-1769, with which this case has been consolidated, the parties which participated in the proceedings before the court below and are not listed in the caption of the case in this Court are the following:

1. Windsor Minerals, Inc.
2. The State of Vermont
3. The Commonwealth of Massachusetts
4. Canadian Pacific, Ltd.
5. The Railway Labor Executives' Association

---

* A description of the legal nature and corporate affiliations of petitioners and respondent, pursuant to Rule 29.1 of this Court's Rules, was provided in the Petition for Writ of *Certiorari* filed in this proceeding by Amtrak and Central Vermont. *See id.* at ii n.*.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT	3
A. Background	3
1. Amtrak's "Montrealer" Operations	5
2. Steps Leading To Amtrak's Application To The ICC	8
B. Proceedings Below	11
1. The Commission Decision	11
2. The Decision Of The Court Below	16
3. The Amendment Of The Statute And The Denial Of Rehearing	18
SUMMARY OF ARGUMENT	19
ARGUMENT	24
I. THE INTERSTATE COMMERCE COMMISSION PROPERLY INTERPRETED SECTION 402(d) OF THE RAIL PASSENGER SERVICE ACT TO PERMIT AMTRAK'S CONDEMNATION OF THE B&M SEGMENT	24
A. Even Before The 1990 Amendment, The Language, Legislative History, Structure And Purpose Of The RPSA All Supported The Commission's Interpretation	25
1. The Language Of Section 402(d)	25
2. The Legislative History Of Section 402(d)	31
3. The Structure Of Section 402 As A Whole	34

B. The Commission's Interpretation Of Section 402(d) Was Entitled To Deference Under *Chevron* 36

C. Any Doubts As To The Correctness Of The Commission's Interpretation Of Section 402(d) Were Definitively Resolved By The 1990 Amendment 38

D. No Genuine Constitutional Question Is Presented By The Commission's Interpretation of Section 402(d) 42

II. THE INTERSTATE COMMERCE COMMISSION CORRECTLY DETERMINED THAT BOSTON & MAINE DID NOT MAKE EITHER OF THE TWO SHOWINGS IT HAD TO MAKE TO OVERCOME THE STATUTORY PRESUMPTION IN FAVOR OF THE CONVEYANCE TO AMTRAK 44

A. The Commission Correctly Concluded That B&M Failed To Prove That Amtrak Had An Adequate Alternative 45

B. The Commission Correctly Concluded That B&M Failed to Prove That Its Service Would Be Significantly Impaired 46

CONCLUSION 48

APPENDIX

Section 102 of the Rail Passenger Service Act, As Amended, 45 U.S.C. § 501a (1988) 1a

Section 305(d) of the Rail Passenger Service Act, As Amended, 45 U.S.C. § 545(d) (1988) 3a

Section 402 of the Rail Passenger Service Act, As Amended, 45 U.S.C. § 562 (1988) 6a

The Independent Safety Board Act Amendments of 1990, Pub.L. No. 10-641, § 9, 104 Stat 4658 (November 28, 1990) 12a

TABLE OF AUTHORITIES

CASES: Page

Berman v. Parker, 348 U.S. 26 (1954) 23,42

Boston & Maine Corp. v. Interstate Commerce Commission, 911 F.2d 743 (D.C. Cir. 1990), *reh. denied*, 925 F.2d 427 (D.C. Cir. 1991) 5,*passim*

Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corp., 4 I.C.C.2d 761 (1988) . 14,15

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 16,21,22,36,37

General American Transp. Co. v. Interstate Commerce Commission, 872 F.2d 1048 (D.C. Cir.), *cert. denied*, 493 U.S. 1069 (1990) 35

Guilford Transportation Industries, Inc. —Control—Boston & Maine Corp., 366 I.C.C. 292 (1982), *aff'd in part and remanded in part sub nom. Lamoille Valley R.R. v. Interstate Commerce Commission*, 711 F.2d 295 (D.C. Cir. 1983) ... 6

Guilford Transportation Industries, Inc. —Control—Delaware & Hudson Ry. Co., 366 I.C.C. 396 (1982), *aff'd in part and rev'd in part sub nom. Central Vermont Ry. Inc. v. Interstate Commerce Commission*, 711 F.2d 331 (D.C. Cir. 1983) 6

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 23,42

Illinois Commerce Commission v. Interstate Commerce Commission, 819 F.2d 311 (D.C. Cir. 1987) 5

Kaiser Aluminum & Chemical Corp. v. Bonjorno, 494 U.S. 827 (1990) 39

Mallard v. United States District Court, 494 U.S. 296 (1989) 25

National Railroad Passenger Corp. v. Boston and Maine Corporation, N.A.P. Cases Nos. 72, 74 (Nat'l Arb. Panel November 7, 1988) 7,8,29

Table of Authorities Continued

Page

National Railroad Passenger Corp. v. Boston & Maine Corp., C.A. No. 87-1507 (D.D.C. Sept. 1, 1987), *aff'd*, 850 F.2d 756 (D.C. Cir. 1988) 8

National Railroad Passenger Corp. v. Two Parcels of Land, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987) 19,42,43

National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, ICC Finance Docket 31250, Interim Decision (served April 29, 1988) 11,13,27,28,31

National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, ICC Finance Dockets 31250 and 31259, Interim Decision (served May 25, 1988) 12,13

National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, ICC Finance Dockets 31250 and 31259, Interim Decision (served July 5, 1988) 13

National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, 4 I.C.C.2d 761 (1988) 13,*passim*

National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests in Connecticut River Line in Vermont and New Hampshire, 7 I.C.C.2d 539 (1990) 47

Table of Authorities Continued

Page

STATUTES:

Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548 (1973) 31,32

The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654 (1990) 2,18,22,38

Interstate Commerce Act

- 49 U.S.C. §§ 10101a *et seq.* (1988 & U.S.C.S. 1991 Supp.) 35
- 49 U.S.C. § 10505 (1988) 14
- 49 U.S.C. § 11343 (1988) 15,14

Rail Passenger Service Act of 1970, as amended

- Section 101, 45 U.S.C. § 501 (1988) 3,42
- Section 102 as amended, 45 U.S.C. § 501a (1988) 2,3,35
- Section 301, 45 U.S.C. § 541 (1988) 3
- Section 305(d), 45 U.S.C. § 545(d) (1988) 2,23,32,43,46
- Section 402(a), 45 U.S.C. § 562(a) (1988) 2,*passim*
- Section 402(d), 45 U.S.C. § 562(d) (1988) 2,*passim*
- Section 601, 45 U.S.C. § 601 (1988 & U.S.C.S. 1991 Supp.) 3

Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31 (1976) 31,32

Supplemental Appropriations Act of 1987, Pub. L. No. 100-71, 101 Stat. 391 (1987) 10

28 U.S.C. 1254(1) 2

Table of Authorities Continued

	Page
Vt. Acts (1987 Adj. Sess.) No. 211, Sec. 5 (1988)	10
RULES AND REGULATIONS:	
49 C.F.R. § 213.9 (1990)	6
49 C.F.R. § 1152.10 (1990)	6
49 C.F.R. § 1152.11 (1990)	6
LEGISLATIVE MATERIALS:	
Amtrak Improvement Act of 1973, Pub. L. No. 93-146:	
Conf. Rep. No. 587, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2331	44
S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324	20,27
Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210:	
S. Rep. No. 499, 94th Cong., 1st Sess. 104, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14	32
Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641:	
136 Cong. Rec. S17668 (daily ed. October 27, 1990)	39,41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

Nos. 90-1419, 90-1769

NATIONAL RAILROAD PASSENGER CORPORATION and CENTRAL VERMONT RAILWAY, INC.,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

INTERSTATE COMMERCE COMMISSION, *et al.*,
Petitioners,

v.

BOSTON AND MAINE CORPORATION, *et al.*,
Respondents.

On Writ Of Certiorari To
The United States Court of Appeals
For The District Of Columbia Circuit

BRIEF OF PETITIONERS
NATIONAL RAILROAD PASSENGER CORPORATION and
CENTRAL VERMONT RAILWAY, INC..

OPINIONS BELOW

The decision of the court of appeals is reported at 911 F.2d 743 and reproduced at Pet. App. 5a-27a.[1] The order of the court of appeals denying petitions for rehearing and suggestions for rehearing *en banc* is reported at 925 F.2d 427 (Pet. App. 1a-4a). The unreported order of the court of appeals entered on February 25, 1991, granting motions to stay the issuance of its mandate, is reproduced at Pet. App. 28a. The final decision of the Interstate Commerce Commission, served August 9, 1988, is reported at 4 I.C.C.2d 761 (Pet. App. 29a-109a). The Interstate Commerce Commission's unreported interim decisions served July 5, 1988, May 25, 1988, and April 29, 1988, are reproduced at Pet. App. 110a-112a, 113a-118a and 119a-135a, respectively.

JURISDICTION

The judgment of the court below was entered on August 10, 1990. Timely petitions for rehearing were denied on February 1, 1991. The petition of Amtrak and Central Vermont for a writ of *certiorari* was filed on March 11, 1991 and was granted on October 7, 1991. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Sections 102 (as amended), 305(d), and 402 of the Rail Passenger Service Act ("RPSA"), 45 U.S.C. §§ 501a, 545(d) and 562 (1988), and a 1990 amendment to Section 402(d)(1) of the RPSA, The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (November 28, 1990), are reprinted in the Appendix to this Brief ("Br. App.") at 1a-12a.

[1] "Pet. App." refers to the appendix to the petition in No. 90-1419.

STATEMENT

This case concerns the scope of the right of the National Railroad Passenger Corporation ("Amtrak"), under Section 402(d) of the RPSA, to obtain from the Interstate Commerce Commission ("ICC" or "the Commission") an order requiring the conveyance of property of another railroad (in this case, a line of track) needed for Amtrak's federally-assisted intercity rail passenger service. The Commission ordered the conveyance, but the court of appeals, expressly disagreeing with the Commission's interpretation of a statute it administers, set aside the order. Congress then enacted an amendment embracing the Commission's interpretation, but although the amendment was specifically made applicable to pending cases and was clearly intended to apply to *this* case, the court of appeals determined on rehearing not to give it effect.

A. Background

Congress enacted the RPSA in 1970, creating Amtrak for the purpose of providing modern, efficient, cost-effective intercity rail passenger service on a nationwide basis. *See* 45 U.S.C. §§ 501, 501a (1988). Although Amtrak is not an agency or instrumentality of the United States (*see* 45 U.S.C. § 541 (1988)), Congress supports it with both capital grants and annual operating subsidies. *See generally* 45 U.S.C. § 601 (1988 & U.S.C.S. Supp. 1991). Congress amended the RPSA in 1973 to add Section 402(d), authorizing Amtrak to apply to the Commission for

an order requiring another railroad to convey to Amtrak, "on reasonable terms and conditions, including just compensation," property owned by that railroad that is required for Amtrak's intercity passenger service.

In a Section 402(d) application filed on April 4, 1988, Amtrak sought to require Boston and Maine Corporation ("B&M") to convey to Amtrak a fee interest owned by B&M in a 48.8-mile segment between Brattleboro, Vermont and Windsor, Vermont (the "B&M segment") of a rail line along the Connecticut River ("the Connecticut River Line" or "the Line"). In a petition filed with the Commission on April 7, 1988, Central Vermont Railway, Inc. ("Central Vermont") sought Commission approval for the reconveyance of this fee interest from Amtrak to Central Vermont, which would then assume ownership, grant trackage rights to B&M, rehabilitate the B&M segment, and ensure proper maintenance of the segment so that it could carry Amtrak's passenger trains. The Commission approved Amtrak's application and the reconveyance of the fee interest to Central Vermont in a Final Decision dated August 4, 1988 and served August 9, 1988. Pet. App. 29a-109a.

The court below set aside the Commission's order: rejecting the Commission's interpretation of Section 402(d), the court held that Amtrak may not use Section 402(d) to obtain a fee interest in rail property where it does not need to keep the fee interest but intends instead to convey it to another railroad. While petitions for rehearing were pending, Congress amended Section 402(d) to make it clear that Amtrak may reconvey property acquired under the statute as long as the Commission finds that the reconveyance

furthers the purposes of the RPSA. Br. App. 12a. The court below nevertheless denied rehearing, declining to give effect to the amendment in connection with the very transaction it was enacted to vindicate. Pet. App. 1a-4a.

1. Amtrak's "Montrealer" Operations

The Connecticut River Line, of which the 48.8-mile segment here at issue is a part, has historically provided main-line freight and passenger service through parts of Massachusetts, New Hampshire and Vermont. Portions of the Line are owned by B&M, and other portions are owned by Central Vermont. Both B&M and Central Vermont have operated on the Line, pursuant to reciprocal trackage rights agreements, for more than sixty years.[2] *See generally* Pet. App. 9a. From 1972 until April 1987, the Line served as part of the route for Amtrak's *Montrealer* passenger trains between Washington, D.C. and Montreal. *Id.*; *see also* J. Larson V.S., J. App. 34, 36-37.[3]

In 1977, Amtrak and B&M negotiated an Operating Agreement that governed the operation of the *Montrealer* on B&M's lines until the agreement was unilaterally terminated by B&M in 1987. J. Larson V.S., J. App. 37. B&M agreed to exercise its best efforts to maintain its rail lines, including the B&M segment,

---

[2] "Trackage rights" are a lease arrangement whereby one railroad (the tenant) is allowed to operate its trains on tracks owned by another railroad (the landlord). *See generally Illinois Commerce Commission v. ICC*, 819 F.2d 311, 312 (D.C. Cir. 1987).

[3] This citation refers to the Verified Statement ("V.S.") of James L. Larson submitted in the proceedings before the ICC, which is reproduced in the parties' Joint Appendix ("J. App.") herein.

in such condition as to permit passenger trains to operate at "not less than" the speeds prescribed in the agreement, generally 50-55 m.p.h. *Id.*; Longhelt V.S., J. App. 68.[4] From 1977 to 1981, B&M maintained the Line sufficiently to allow generally satisfactory on-time performance by the *Montrealer*. J. Larson V.S., J. App. 38; Longhelt V.S., J. App. 69.

In 1983 and 1984, however, Guilford Transportation Industries, Inc. ("Guilford") acquired both the B&M and the Delaware & Hudson Railway ("D&H").[5] The D&H operated over a north-south line parallel to the Connecticut River Line. Because of its access to this alternate route, B&M's reliance on the Connecticut River Line as a freight route significantly decreased. J. Larson V.S., J. App. 38; Crampton V.S., J. App. 86-87. Indeed, on September 2, 1987, B&M amended its System Diagram Map (*see* 49 C.F.R. §§ 1152.10, 1152.11 (1990)) to include the Connecticut River Line in the category of track anticipated to be the subject of an abandonment or discontinuance petition within

[4] Federal Railroad Administration regulations prescribe the condition at which a given segment of track must be maintained to support freight and passenger operations at specified speeds. *See* 49 C.F.R. § 213.9 (1990). In specifying minimum passenger speeds of 55 m.p.h. over portions of the Line, the Amtrak-B&M Operating Agreement effectively required a level of maintenance under the F.R.A. system of track condition classification (F.R.A. Class 3) which would permit freight operations at 40 m.p.h.

[5] *See Guilford Transportation Industries, Inc.—Control—Boston & Maine Corp.*, 366 I.C.C. 292 (1982), *aff'd in part and remanded in part sub nom. Lamoille Valley R.R. v. ICC*, 711 F.2d 295 (D.C. Cir. 1983); *Guilford Transportation Industries, Inc.—Control—Delaware & Hudson Ry. Co.*, 366 I.C.C. 396 (1982), *aff'd in part and rev'd in part sub nom. Central Vermont Ry. Inc. v. ICC*, 711 F.2d 331 (D.C. Cir. 1983).

the next three years. *See* Crampton V.S., J. App. 86-87; *see generally National Railroad Passenger Corp. v. Boston & Maine Corp.*, NAP Cases Nos. 72, 74, Opinion and Order at 11-12 (Nat'l Arb. Panel November 7, 1988) ("NAP Decision").[6]

Following Guilford's acquisition of the B&M, maintenance of the Connecticut River Line by B&M significantly decreased, with an adverse impact on freight and passenger service. From April 1986 through April 5, 1987, the date on which Amtrak discontinued *Montrealer* service, not one passenger train met its contractually agreed-upon schedule. J. Larson V.S., J. App. 38-40; Longhelt V.S., J. App. 69-70; NAP Decision at 8-9. The average time required to operate over the B&M segment during 1987 was approximately 67% higher than it had been in 1981. J. Larson V.S., J. App. 43.[7] Guilford officers and staff made

[6] On March 24, 1988, two days *after* Amtrak filed its Notice of Intention to File Section 402(d) Application with the ICC, B&M filed an amendment to its System Diagram Map, removing the Connecticut River Line from this category. *See* Pet. App. 122a n.2.

[7] When track conditions deteriorate, the railroad with responsibility for maintenance must place speed restrictions ("slow orders") over specific segments in order to insure safe operations. An Amtrak analysis, based on B&M records, of slow orders on the segment's 48.8 miles in October 1986 showed that speed restrictions had increased from *no* mileage restricted on January 21, 1985 to approximately 47 of the segment's 48.8 miles as of September 29, 1986. By April 1987, significant parts were restricted to speeds of 15 m.p.h. or less, including one mile limited to 5 m.p.h. J. Larson V.S., J. App. 42-43; Maas Reb. V.S., J. App. 116; *see* NAP Decision at 9. Track in such condition, of course, made successful provision of time-sensitive passenger service impossible and was also unacceptable in light of Con-

it clear in conversations with Amtrak during 1985 and 1986 that Guilford was rerouting freight traffic to the parallel D&H line and intended to make no significant expenditures for maintenance or upgrading projects on the Connecticut River Line. *Id.*, J. App. 39-40; Longhelt V.S., J. App. 69-70; *see also* NAP Decision at 13-14.

2. Steps Leading To Amtrak's Application To The ICC

Amtrak discontinued *Montrealer* service in April 1987 because of the deterioration of the Connecticut River Line. *See* Pet. App. 9a; *see also* J. Larson V.S., J. App. 32. Thereafter, Amtrak pursued two courses designed to restore the service. J. Larson V.S., J. App. at 46. The first was to ask an arbitration panel to order specific performance by B&M of its track maintenance obligations under the Operating Agreement.[8] Guilford's response was to terminate the agreement and refuse to arbitrate.[9] *Id.*, J. App. 46-47.

---

gress' express directions to Amtrak concerning schedules and speeds. *See generally* 45 U.S.C. §§ 501a(6), (8).

[8] *National R.R. Passenger Corporation v. Boston & Maine Corp.*, N.A.P. Case No. 72 (filed April 24, 1987).

[9] *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, Civil Action No. 87-1507 (D.D.C. Sept. 1, 1987). The court of appeals held that the jurisdiction of the arbitration panel was for the panel, not the courts, to determine. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, 850 F.2d 756 (D.C. Cir. 1988). The arbitration panel subsequently held that it had jurisdiction and that B&M was in breach of its maintenance obligations under the Operating Agreement. It found that B&M had deliberately allowed the Line to deteriorate and had taken essentially no action to maintain it in light of its parent, Guilford's, determination to devote funds and energies to the maintenance of the parallel D&H line. *See National R.R. Passenger Corp. v. Boston & Maine Corp.*, N.A.P. Cases Nos. 72, 74, Opinion and Order at 8-14 (Nat'l Arb. Panel November 7, 1988).

Amtrak's other course was to seek a Congressional appropriation of funds for the rehabilitation of the Line, which Amtrak hoped would enable it to break the deadlock with Guilford and restore the *Montrealer* service. Congress did appropriate $5 million for upgrading the *Montrealer*'s route,[10] and Amtrak again sought to negotiate a compromise with Guilford under which the B&M segment would be rehabilitated and Guilford would thereafter maintain it at appropriate levels. *Id.*, J. App. 47. After one meeting in which Guilford indicated it was studying possible abandonment of the Line, Guilford terminated negotiations. *Id.*, J. App. 47-48; *see* Pet. App. 130a n.11.

Amtrak now faced a dilemma. Congress had appropriated $5 million for the specific purpose of rehabilitating the Connecticut River Line so that the *Montrealer* service could be resumed. In light of B&M's past performance, however, Amtrak could not responsibly spend funds on the rehabilitation of the B&M segment without a commitment to long-term maintenance that B&M was unwilling to provide. On the other hand, Amtrak did not have sufficient funds to allow it to purchase the Line, rehabilitate it, *and* finance its long-term maintenance. J. Larson Reb. V.S., J. App. 131-32.

In order to arrange for the rehabilitation and maintenance of the Line and thus make restoration of the *Montrealer* service possible, Amtrak entered into negotiations with Central Vermont, which owned the

---

[10] Supplemental Appropriations Act, 1987, Pub. L. No. 100-71, 101 Stat. 391, 447-48 (July 11, 1987).

segments of the Line adjacent to both ends of the B&M segment and had reasons to maintain the track in good condition because, unlike B&M, it had no alternative route for its freight trains. *See* Maas Reb. V.S., J. App. 117-19. In March of 1988, Amtrak and Central Vermont agreed that (i) Amtrak would purchase the B&M segment or, if necessary, seek to condemn it under Section 402(d); (ii) Amtrak would then transfer title to the segment to Central Vermont at Amtrak's cost; (iii) Amtrak would pay Central Vermont up to $3.1 million of the appropriated funds to upgrade the Line to a condition suitable for Amtrak's high-speed passenger service; (iv) Central Vermont would fund the balance of the cost of rehabilitation and maintain the segment in good condition for a period of 20 years; and (v) Central Vermont would allow passenger service by Amtrak and grant trackage rights to B&M. *See* Pet. App. 114a. The State of Vermont entered into an agreement with Central Vermont pursuant to which the State provided in excess of $1.1 million in funding to assist in Central Vermont's purchase and rehabilitation of the B&M segment. *See* Vt. Acts. (1987 Adj. Sess.) No. 211, Sec. 5 (eff. May 26, 1988). Amtrak made an offer to purchase the B&M segment, which B&M declined. Pet. App. 11a, 130a-131a; *see* J. Larson V.S., Exs. 1-3, J. App. 55-62. Amtrak then filed an application with the Commission under Section 402(d), asking the Commission to order B&M to make the conveyance, and Central Vermont filed a petition seeking Commission approval of the reconveyance from Amtrak to Central Vermont.[11]

---

[11] In view of the severe deterioration in the condition of the Connecticut River Line and the resulting adverse impact on

B. Proceedings Below

1. The Commission Decision

Section 402(d) is available only if Amtrak and the railroad that owns property Amtrak needs are "unable to agree upon terms for the sale to [Amtrak] of [the] property (including interests in property) . . . ." *See* 45 U.S.C. § 562(d)(1). Br. App. 8a-9a. B&M first sought a dismissal of Amtrak's Section 402(d) application, arguing that the application was defective as a matter of law because it did not establish that Amtrak and B&M were "unable to agree". In an interim decision dated April 26, 1988 and served April 29, 1988, the Commission rejected this argument:

> According to B&M . . . Amtrak . . . has not met the statutory precondition for filing an application under section 402(d) that requires that the parties be "unable to agree upon the terms of the sale." . . . We disagree. Amtrak has set forth a detailed history of its dealings and negotiations with B&M over the Conn River Line, and of its efforts to maintain passenger service over this line. Amtrak made a valid offer to purchase and, in response, B&M stated by letter dated March 29, 1988 that there was "no need to pursue the very complex offer to purchase" and instead proposed negotiations for compensation to B&M to rehabilitate and maintain its line

---

passenger and freight rail service, each of the states most directly affected by the Amtrak-Central Vermont proposal—Vermont, Massachusetts and New Hampshire—intervened in the proceedings before the Commission in support of the proposed transactions.

> for Amtrak's passenger service. . . . Amtrak has sufficiently demonstrated that the parties have not been able to agree on the sale of the line to warrant the institution of a proceeding under section 402(d).

Pet. App. 130a (footnotes omitted).

In a second preliminary ruling, dated May 19, 1988 and served on May 25, 1988, the Commission rejected a B&M request that the Commission convert Amtrak's Section 402(d) application into an application under Section 402(a) of the RPSA for the *use* of the B&M segment.[12] The Commission held that Amtrak had an "election of remedies"; as a result, Amtrak could determine that a mere right to use the track, with ownership remaining in B&M, would not meet its needs, and that the procedures available under Section 402(a) were therefore insufficient:

> Under Sections 402(a)-(d) of RPSA, respectively, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. . . . Here, Amtrak has made an election of remedies by filing its application under section 402(d) for conveyance of the subject line, and has done so deliberately. *Amtrak's position clearly is that only when the subject line belongs to a party other than B&M will the line be available for prompt*

[12] Section 402(a), 45 U.S.C. § 562(a), provides that if Amtrak seeks the "use of tracks and other facilities" of a railroad and the parties are unable to agree, the Commission may order such use "on such terms and for such compensation as the Commission may fix as just and reasonable . . . ."

> *upgrading, permitting restoration of reliable and economical passenger service.* . . . As discussed in our April 29th decision, Amtrak has met the statutory criteria for the institution of a proceeding under Section 402(d). Thus, Amtrak is plainly entitled under the statute to a decision on the requested conveyance of the line.

Pet. App. 115a-116a (emphasis added). In a further interim decision dated July 1, 1988 and served July 5, 1988, the Commission stated that it anticipated granting the conveyance sought by Amtrak, and instructed the parties to submit their respective arguments and evidence regarding the just compensation issue. Pet. App. 110a.

In its Final Decision, the Commission applied the two statutory tests set forth in Sections 402(d)(1)(A) and (B).[13] The section provides that the Commission "shall order the conveyance of the property to [Amtrak]" unless the conveyance fails *both* tests. Subparagraph (B) asks whether Amtrak's passenger service obligations "can adequately be met by the acquisition of alternative property (including interests in property)[.]" The Commission considered and rejected each proposed alternative route for providing passenger train service to the areas of New England that the *Montrealer* had served. Pet. App. 46a. Sub-

[13] In its Final Decision, the Commission also reaffirmed the determinations made in its interim decisions served April 29, May 25, and July 5, 1988. *See* Pet. App. 40a, 42a. The Commission also declined B&M's invitation to find, based on various arguments, that Section 402(d), if interpreted to permit the Amtrak condemnation/reconveyance transaction, would be unconstitutional. Pet. App. 43a-45a.

paragraph (A) asks whether the conveyance would significantly impair the ability of the conveying railroad to carry out *its* obligations. Although not required to do so in light of its finding under subparagraph (B), the Commission also considered the subparagraph (A) question and found that in addition to receiving just compensation, "[B&M] has the option of retaining its local traffic [on the B&M segment] through a trackage rights agreement." Pet. App. 46a. The Commission agreed to establish the terms for B&M's trackage rights if the parties were unable to resolve them through negotiations. *See* Pet. App. 107a. It concluded that B&M's "ability to carry out its common carrier obligations . . . will not be impaired." Pet. App. 46a.

Since the Commission was required to order the conveyance unless it answered *both* statutory questions "yes", and since the Commission answered both questions "no", it concluded "that Amtrak has established its need under § 402(d) to warrant conveyance of the Connecticut River Line for the restoration of the Montrealer passenger service." *Id.* Accordingly, the Commission proceeded to address the appropriate valuation methodology for determining the just compensation due B&M for the taking, and awarded B&M $2,373,286. Pet. App. 46a-81a. B&M has since been paid that amount.[14]

In its Final Decision, the Commission also granted Central Vermont's petition for an exemption, pur-

[14] While several parties to the Commission proceedings—including the present petitioners—sought appellate review of the Commission's valuation analyses and conclusions, those issues were not reached by the court below and are not before this Court for review.

suant to 49 U.S.C. § 10505, from plenary Commission review, under 49 U.S.C. §§ 11343 *et seq.*, of its acquisition of the B&M segment from Amtrak.[15] The Commission found that: (1) B&M's acceptance of trackage rights would insure its continued ability to provide freight service on the Connecticut River Line; (2) Central Vermont's upgrading and maintenance of the B&M segment would enhance its own *and* B&M's ability to provide competitive service; (3) the exemption would enable Central Vermont to undertake rehabilitation of the segment on an expedited basis in furtherance of Congressional intent; and (4) the directly affected States all favored the transaction. The Commission therefore concluded that the exemption sought by Central Vermont should be granted. Pet. App. 84a-85a.[16]

[15] As explained by the Commission:

> [U]nder 49 U.S.C. § 10505, we must exempt a transaction . . . from regulation when we find that: (1) continued regulation is not necessary to carry out the rail transportation policy of 49 U.S.C. § 10101a; and (2) either (a) the transaction . . . is of limited scope, or (b) regulation is not necessary to protect shippers from abuse of market power.

Central Vermont Railway, Inc.—Petition for Exemption—Acquisition and Operation of Certain Interests in Rail Lines from the National Railroad Passenger Corp., ICC Finance Docket 31259, 4 I.C.C.2d at 798-99. Pet App. 82a.

[16] Chairman Gradison dissented, arguing that Section 402(d) does not authorize what she viewed as an "attempt by Amtrak to restructure [ownership of the fee] as between private, competing rail common carriers . . . ." *See* Pet. App. 96a-97a. The dissent also questioned the constitutionality of such an application of Section 402(d) in view of the "public use" requirement of the Fifth Amendment. *Id.* at 97a-105a.

The B&M segment was conveyed to Amtrak, upon its payment of just compensation to B&M, in September 1988, and Amtrak reconveyed the property to Central Vermont. The rehabilitation was performed, and Amtrak reinstituted *Montrealer* service in July 1989. Pet. App. 13a.

2. The Decision Of The Court Below

On B&M's petition for review, the court of appeals set aside the Commission's order directing the conveyance from B&M to Amtrak. Pet. App. 5a-27a. The panel majority held that Section 402(d) may not be used "to force the conveyance of property from one private owner to another . . . ." *Id.* at 7a. Noting that Amtrak could have obtained trackage rights on the B&M segment in a proceeding under Section 402(a), or condemned an easement under Section 402(d), and asserting that, since the fee interest was to be conveyed to Central Vermont, Amtrak must have had no need for that interest, the majority said, "[W]e conclude that [the RPSA] does not permit Amtrak to take property by eminent domain for which it concededly has no need itself . . . . " Pet. App. 15a.

The majority took note of the fact that the Commission had interpreted the statute to give Amtrak "a choice of remedies". *Id.* The majority also recognized that the Commission had concluded that, because of the need for continuous maintenance of the B&M segment, Amtrak needed to have the segment in the hands of a "responsible owner . . . that could be counted on to maintain the tracks in a condition suitable for the Montrealer." *Id.* at 20a.

But the majority said that under *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), it was not obliged to defer to the ICC if it could determine "that Congress had an intention on the precise question at issue." Pet. App. 16a. It then proceeded to conclude that Congress' intention was "unambiguous", *id.* at 16a, and that it was "clear enough that the statute contemplates that the property acquired by condemnation must be required by Amtrak for *its* use," *id.* (emphasis in original), a test it said was not met here since Amtrak did not intend to keep the fee interest. The court also stated that an interpretation of the statute that would permit Amtrak to condemn one private railroad's property in contemplation of an immediate reconveyance to another would give rise to "at least colorable Fifth Amendment problems." Pet. App. 21a.[17]

Judge Ruth B. Ginsburg, concurring in the result, disagreed with the majority's interpretation of Section 402 and with its decision to "overrid[e] the agency" (Pet. App. 24a) on a question of statutory construction: "Nothing in the text of the RPSA, or in its legislative history, appears to me to force the conclusion . . . that because trackage rights are central to the challenged transaction, Amtrak had to resort to Section 402(a), or, alternatively, attempt to condemn a lesser property interest. . . ." Pet. App. 24a.[18]

---

[17] The court also said, adopting B&M arguments that had not been made to the Commission, that its interpretation of Section 402(d) was dictated by a supposed congressional "policy against cross-subsidization, that is, against having one segment of the rail industry bear the expense of facilities and improvements of primary benefit to another." Pet. App. 22a.

[18] Judge Ginsburg concluded that a need for transfer to a new owner in order to assure adequate maintenance could justify invocation of Section 402(d) but that, while Amtrak had asserted

3. The Amendment Of The Statute And The Denial Of Rehearing

While petitions for rehearing were pending, Congress *did* clearly express its "intention on the precise question at issue," and its intention was precisely the opposite of the one attributed to it by the court of appeals. Congress amended Section 402(d)(1) to add the following sentence at the end:

> [Amtrak] may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of [the RPSA].

Independent Safety Board Act Amendments of 1990, Pub. L. 101-641, § 9(a), 104 Stat. 4654, 4658 (November 28, 1990). Br. App. 12a. The amendment was explicitly made applicable to pending cases. *Id.*, § 9(b).

Notwithstanding this clarification, the court below denied rehearing. The court acknowledged that Congress intended that the amendment be applied in the instant case. Pet. App. 3a. The court nevertheless refused to apply the amendment because, according to the court, it "does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not 'required for intercity rail passenger service.' " *Id.* The court also concluded that the Second Circuit's contrasting

---

invocation of Section 402(d) but that, while Amtrak had asserted such a need, the Commission had not, in her view, made adequate findings on the point. She therefore concurred in the remand to the Commission. Pet. App. 25a-27a. *But see* n.20, *infra* at 30.

decision in *National Railroad Passenger Corp v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987), was distinguishable. Pet. App. 2a. Judge Ginsburg reiterated her disagreement with the majority's reading of Section 402(d), noting that the amendment "coincides with my view that the [Commission] plausibly interpreted section 402." Pet. App. 4a.

SUMMARY OF ARGUMENT

The Commission interpreted Section 402 of the RPSA as giving Amtrak an "election of remedies". Pet. App. 39a. The subsection (d) procedure is available whenever (1) a line of track or other property owned by a railroad is "required for [Amtrak's] intercity passenger service" and (2) Amtrak and the railroad are "unable to agree" on terms of sale. With respect to the first condition, where property is sought for intercity passenger use, the statute says that Amtrak's need for the property "*shall* be deemed to be established" and the Commission "*shall* order the conveyance of the property to [Amtrak] on such reasonable terms and conditions as it may prescribe, including just compensation" (emphasis added), unless the Commission finds *both* that the conveyance would significantly impair the conveying railroad's provision of freight service *and* that "adequate[]" alternative property to meet Amtrak's needs is available in specified ways not pertinent here. Amtrak's right to an order of conveyance is not conditioned on the unavailability of any other remedy. To the contrary, the choice between a subsection (d) condemnation and other remedies is, as the Commission recognized, Amtrak's: "Amtrak is empowered to seek different types

of relief depending on the type of service problems it encounters with other railroads." Pet. App. 39a.

Congress deliberately gave Amtrak the swift and sure remedy of condemnation because it recognized that Amtrak's "relatively inflexible" requirements for specific lines of track and other properties would often place Amtrak in "disadvantageous bargaining position[s]" when seeking property "necessary to perform its public service mission" and because it wanted Amtrak, whose operating losses are federally funded, to be able to use "the most economical means by which Amtrak could fulfill its requirements for a facility." S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973). The certainty that Amtrak can acquire property by eminent domain, and that its attempt to do so will not be frustrated by prolonged and risky litigation about whether threshold conditions have been met, facilitates negotiations between Amtrak and freight railroads, generally enabling Amtrak to meet its operating needs through negotiation without resort to the subsection (d) remedy. And where Section 402(d) must be invoked, the requirement of an expedited proceeding (*see* Section 402(d)(2)), in which the opportunity to block the conveyance is narrow, means that Amtrak can quickly upgrade track and provide (or resume) passenger train service.

The court of appeals expressly rejected the Commission's reading of Section 402(d). The majority found that Congress had an "unambiguous" (Pet. App. 16a, 23a) intention to permit Amtrak to condemn only those interests in property that it needs to own. It suggested that if Amtrak needs only the "*use*" of property (*id.* at 22a (emphasis in original)), Amtrak

is required to proceed under Section 402(a). And it rejected (Pet. App. 20a) the Commission's view that Amtrak could condemn a segment of rail line and transfer it to a responsible railroad in order to assure that the segment would be satisfactorily maintained and kept available for Amtrak's use. All of this was erroneous for three different reasons.

First, even before the 1990 amendment of Section 402(d), the text and legislative history of Section 402(d) and the structure and purpose of Section 402 as a whole clearly supported the Commission's interpretation, not the reading substituted by the panel majority. The text contained no hint that Amtrak must pursue any other statutory remedy in preference to invoking Section 402(d), or that the Commission should second-guess Amtrak's assessment of its needs or limit each conveyance to the minimum interest the Commission might think Amtrak needed, or that Amtrak was required to retain any interest conveyed to it. To the contrary, the text told the Commission that it "shall" order the conveyance applied for unless a narrow exception applies, and the text, the legislative history, and the overall structure of Section 402 all reflect an intention to help, not hinder, Amtrak in making economical arrangements for the facilities it needs.

Second, even if the traditional tools of statutory interpretation had offered some support for the panel majority's reading, the majority could not simply "impose its own construction on the statute" (*Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984)), in place of the interpretation made by the responsible agency. Under *Chevron*, a reviewing court may displace an otherwise

permissible agency interpretation only if it finds that "Congress has directly spoken to the precise question at issue" (*id.* at 842). Here, the majority found that the intention of Congress was "unambiguous[ly]" contrary to the Commission's interpretation, without any supporting textual or historical evidence on the "precise question at issue" and in the face of the third panel member's view that the majority's reading was altogether wrong. This was an obvious evasion of *Chevron*.

Third, in any event, Congress then *did* speak to the precise question at issue, and it confirmed the Commission's interpretation. In a 1990 amendment intended to reverse the panel's result in this case, Congress provided that Amtrak "may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act." *See* Br. App. 12a. On petitions for rehearing, however, the majority said that the 1990 amendment did not alter its conclusion that a planned reconveyance would invalidate a Section 402(d) conveyance "in the first place" (Pet. App. 3a); the amendment, the majority said, merely confirmed that Amtrak could make a "*subsequent*" (*id.*)—*i.e.*, not previously planned—reconveyance of property it had obtained under Section 402(d). With all respect, this interpretation of the amendment ignores its provenance and its clear purpose, reduces it to a wholly unnecessary restatement that Amtrak has the right to convey what it owns, and is plainly wrong.

The court of appeals also suggested that the Commission's interpretation of Section 402(d) gave rise to "colorable" questions under the "public use" requirement of the Fifth Amendment Takings Clause, Pet. App. 21a, and would violate a supposed policy against "cross-subsidization". *Id.* at 22a. But there is no question that the objective of making suitable arrangements for the rehabilitation, subsequent maintenance, and continued availability of a rail line for passenger transportation is a "public use" objective. *Cf. Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). And apart from the fact that there is no policy against cross-subsidization in any pertinent provision of the RPSA, there is no cross-subsidization of any kind here: B&M was awarded "just compensation" for its property (as well as trackage rights over a line it had recently planned to abandon), and Central Vermont entered wholly voluntarily into a transaction acceptable to it.

Finally, the panel majority suggested (Pet. App. 18a-20a) that respondent B&M had made the two showings necessary to permit the Commission to decline to order the conveyance, but both halves of this suggestion rest on misreadings of the statute. The "adequate alternative property" referred to in Section 402(d)(1)(B) must be either rail property "available for sale on reasonable terms" or *non-rail* property subject to condemnation under 45 U.S.C. § 545(d). No alternative of either kind was available here; the "lesser interest" in the B&M segment suggested by the court was neither "available for sale on reasonable terms" nor subject to condemnation under 45 U.S.C. § 545(d). The majority also suggested (Pet. App. 19a) that the "significant impairment" test of Section 402(d)(1)(A) should be applied by considering the conveyance alone, without regard to the trackage rights that the Commission (not, as the majority

states, Central Vermont) afforded to B&M. But the Commission's view (Pet. App. 46a) that the impact on B&M should be measured in light of the transaction as a whole was clearly correct: Section 402(d) instructs the Commission to order a conveyance "on reasonable terms and conditions"; there is no reason why, in testing the effect of the conveyance, the Commission should be required to ignore the conditions it is, in fact, imposing.

ARGUMENT

I. THE INTERSTATE COMMERCE COMMISSION PROPERLY INTERPRETED SECTION 402(d) OF THE RAIL PASSENGER SERVICE ACT TO PERMIT AMTRAK'S CONDEMNATION OF THE B&M SEGMENT

The Commission interpreted Section 402(d) to allow Amtrak to seek the conveyance of a fee interest in a rail line required for intercity passenger service, even if Amtrak plans to keep only the right to use the line and intends to convey the fee interest (in a transaction separately subject to ICC review) to another railroad that undertakes to rehabilitate the line with Amtrak's funds and maintain it at a level adequate for passenger service. The court of appeals rejected this interpretation on the ground that Congress had an "unambiguous" intention to permit condemnation only of the specific interest in property that Amtrak intends to keep and own itself. Pet. App. 20a. The Commission's interpretation, we submit, was correct, was in any event entitled to deference under *Chevron*, and was clearly vindicated by the 1990 Amendment.

A. Even Before The 1990 Amendment, The Language, Legislative History, Structure And Purpose Of The RPSA All Supported The Commission's Interpretation

The court of appeals, purporting to examine "the language and history of subsection (d) and the structure of Section 402," Pet. App. 16a, concluded that the statute "unambiguous[ly]" bars the conveyance of a fee interest in rail property under Section 402(d) where a "lesser interest" obtainable pursuant to Section 402(a) or Section 402(d) might suffice, and bars the conveyance under Section 402(d) of interests Amtrak does not intend to keep. Pet. App. 17a-18a. The Commission had found no such limitation but had read the statute, sensibly, to allow Amtrak to apply for conveyance of the fee interest as part of an arrangement to assure the availability of an adequately maintained line. The Commission was plainly correct.

1. The Language Of Section 402(d)

As this Court has repeatedly stated, "[i]nterpretation of a statute must begin with the statute's language." *Mallard v. United States District Court*, 490 U.S. 296, 300 (1989) (citations omitted). At the time of the Commission's decision (*i.e.*, prior to the 1990 Amendment), Section 402(d) provided, in pertinent part, as follows:

> (1) If [Amtrak] and a railroad are unable to agree upon terms for the sale to [Amtrak] of property (including interests in property) owned by the railroad and required for intercity rail passenger service, [Amtrak] may apply to the Commission for an order establishing the need of [Amtrak] for the property at issue and requiring the conveyance thereof from the railroad to [Amtrak] on

reasonable terms and conditions, including just compensation. Unless the Commission finds that—

> (A) conveyance of the property to [Amtrak] would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and
>
> (B) the obligations of [Amtrak] to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak], or available to [Amtrak] by the exercise of its authority under section 545(d) of this title,

the need of [Amtrak] for the property shall be deemed to be established and the Commission shall order the conveyance of the property to [Amtrak] on such reasonable terms and conditions as it may prescribe, including just compensation.

45 U.S.C. § 562(d)(1). Br. App. 8a-9a.

Four points are noteworthy about this language. First, Congress clearly wanted the Commission to accommodate Amtrak's needs, not to impose obstacles. The section imposes only two requirements, first that Amtrak and the railroad be "unable to agree" on terms of sale and second that Amtrak have a "need" for the property at issue. With respect to the second requirement, the statute says the need "shall be deemed to be established" and the Commission "shall" order the conveyance unless it finds *both* that the conveyance would significantly impair the operations of the conveying railroad *and* that Amtrak's needs can be met by acquiring alternative property. To say

the least, this language does not suggest that the section should be read in a cramped fashion, so as to make Amtrak's use of the eminent domain power difficult and uncertain.

To the contrary, the language reflects Congress' recognition of Amtrak's need for a swift and sure means of obtaining the properties over which it provides service. Congress gave Amtrak the power of eminent domain so that it could avoid "disadvantageous bargaining position[s]" when seeking property "necessary to perform its public service mission." *See* pp. 32-33, *infra*. Uncertainty about the availability of the remedy would hamper the Amtrak-railroad negotiations that up to now have made resort to Section 402(d) virtually unnecessary. And litigation before the Commission and a reviewing court over the precise extent of Amtrak's needs would delay the provision (or, as here, resumption) of service, perhaps for years. Congress therefore deliberately instructed the Commission that it could deny an Amtrak application only in narrowly defined circumstances.

Second, there is no textual basis for the court of appeals' notion that Amtrak may not proceed under Section 402(d) unless trackage rights obtainable under Section 402(a) have been shown to be insufficient. Although enacted after Section 402(a), Section 402(d) does not refer at all to Section 402(a) or suggest any such limitation. As the Commission recognized,

> [u]nder Sections 402(a)-(d) of RPSA, respectively, Amtrak is empowered to seek different types of relief depending on the type of service problems it encounters with other railroads. In each case, relief may be granted

> only upon application by Amtrak, and in each case different criteria, procedures, and standards apply. *See* 45 U.S.C. 562(a)-(d).

Pet. App. 115a-116a. This analysis is clearly correct. Section 402(d) contains no language, plain or otherwise, limiting Amtrak's exercise of its condemnation power to only those situations where its need for rail property in furtherance of its provision of rail passenger service cannot be satisfied by trackage rights obtainable pursuant to Section 402(a).

Third, there is also no textual support for the court of appeals' conclusion (*see* Pet. App. 19a-20a) that the Commission should second-guess Amtrak's assessment of its needs and allow conveyance only of the *minimum* property interest the Commission concludes will meet Amtrak's needs. To the contrary, the statute leaves it to Amtrak to attempt to reach agreement on terms for the sale of whatever interests in a rail line *it* thinks it needs and, failing such an agreement, to apply to the Commission for an order requiring the conveyance of that interest. The Commission is instructed to issue the order unless it finds *both* "significant" impairment *and* the availability for sale on reasonable terms of suitable alternative rail property or alternative non-rail property which may be condemned. Nothing in the text suggests that the Commission has any general power to second-guess Amtrak's views as to the extent of its needs.

Before the Commission, B&M argued "that Amtrak could achieve its purposes under § 402(d) by acquiring an easement or trackage rights for passenger service without divesting B&M of ownership," but the Commission properly rejected this argument. Pet. App. 42a-43a. Section 402(d), which speaks of "property

(including interests in property)", clearly *permits* Amtrak to seek conveyance of an easement if Amtrak determines that that interest will best meet its needs and is unable to reach agreement with the owner. But nothing in the plain language of the statute *requires* Amtrak to condemn such a "lesser interest" if it believes it needs the fee interest. Contrary to the court's suggestion, the Commission did not "read[] the words 'interest in property' out of the statute" (Pet. App. 20a) but, rather, merely refused to read *into* the statute limitations or requirements that do not appear there.[19]

Finally, even before the 1990 Amendment, the language of Section 402(d) offered no support for the proposition (Pet. App. 15a) that Amtrak could seek conveyance only of interests in property it intended to retain. The majority purported to find such support in the words "required for intercity rail passenger service." But those words mean only that Amtrak must intend to use the rail line or other property at issue in its operations, as Amtrak indisputably in-

---

[19] Petitioners wholly disagree with the court's apparent supposition that the acquisition of trackage rights or an easement in the B&M segment would have been sufficient to meet Amtrak's needs. Amtrak had once *had* trackage rights over the segment pursuant to its Operating Agreement with B&M. As the arbitration panel ultimately held, B&M breached that agreement by failing to maintain the Line in a condition satisfactory for running high-speed passenger trains; B&M indicated that it had no intention to resume proper maintenance, and even designated the Line for abandonment. *See* NAP Decision at 8-14. In these circumstances, the court's reading of Section 402(d) to require Amtrak to resume a dependency relationship with B&M is not only a misconstruction of the plain language of the statute but also defies actual past experience.

tended to use the B&M segment here; they say nothing about retention of interests. Since Amtrak plainly "required" the B&M segment to operate the *Montrealer* and was unable to agree with B&M on terms of purchase, Amtrak was authorized by Section 402(d) to apply to the Commission for an order of conveyance, as one part of a plan to have a rehabilitated and maintained B&M segment available for its use. The Commission properly accepted Amtrak's position on this point:

> Amtrak reiterates that it will be providing more than $3 million in funds which have been appropriated specifically for its benefit by Congress. Amtrak states that in exchange for this investment, it will obtain rehabilitation of the rail line, a guaranteed 20 years of proper maintenance on the rail line, and a commitment allowing Amtrak trains to operate on the rail line at a reasonable, predetermined compensation level.

Pet. App. 41a-42a (footnote omitted). Crediting these statements of Amtrak, the Commission "conclude[d] that Amtrak has demonstrated that it has not abused the process available under § 402(d) by means of its dealings with [Central Vermont]." *Id.*[20]

---

[20] Judge Ginsburg's opinion concurring in the result and her separate statement regarding the petitions for rehearing suggest that Section 402(d) requires the Commission to make a threshold finding, separate and apart from the factual inquiries required by subparagraphs (d)(1)(A) and (d)(1)(B) of the statute, that property designated for condemnation by Amtrak is "required for intercity rail passenger service." *See* Pet. App. 4a, 25a-26a. As shown by the foregoing analysis, however, Judge Ginsburg's reading of the statute is flawed; it is only necessary for the Commission to determine that Amtrak intends to use the rail line or other tangible property at issue in connection with its intercity rail passenger operations in order for the Commission's processes to be invoked, and the findings the Commission then makes under Sections 402(d)(1)(A) and (d)(1)(B) determine Amtrak's right to the conveyance, subject, of course, to payment of just compensation and such other reasonable terms and conditions as the Commission prescribes.

2. The Legislative History Of Section 402(d)

The Commission had no occasion to refer to the legislative history of Section 402(d) in its Final Decision. The court of appeals, however, purported to find support in the legislative history for the interpretation of Section 402(d) with which it supplanted the Commission's reading of the statute. In fact, the legislative history confirms the correctness of the Commission's interpretation.

Three years after the enactment of the RPSA, the Act was amended by the Amtrak Improvement Act of 1973, Pub. L. No. 93-146, 87 Stat. 548, which, *inter alia*, added subsection (d) to Section 402. Section 402(d) originally provided that Amtrak could apply to the Commission for conveyance of railroad property "required for the construction of tracks and other facilities necessary to provide intercity rail passenger service[.]" Pub. L. No. 93-146, § 10, 87 Stat. at 552; *see also* Pet. App. 132a. Then, in 1976, Section 402(d) was given its pre-1990 language by Section 706(h) of the Railroad Revitalization and Regulatory Reform Act ("4R Act"), Pub. L. No. 94-210, 90 Stat. 31, 125, which amended Section 402(d) to specify that Amtrak may condemn railroad property under that provision "without regard to whether or not construc-

tion of new tracks and facilities is involved." *Id.*; *see* S. Rep. No. 499, 94th Cong., 1st Sess. 104, *reprinted in* 1976 U.S. Code Cong. & Admin. News 14, 119-20.[21]

The Senate Report on the Amtrak Improvement Act of 1973 illuminates Congress' intent in "giving [Amtrak] the power of eminent domain": the Report states, in pertinent part:

> At the present time [Amtrak] leases terminal and other facilities from various railroads. *These facilities are not always best adapted to Amtrak's needs, nor is a lease always the most economical means by which Amtrak could fulfill its requirements for a facility.* For instance, it might make more economic sense for [Amtrak] to build a new facility at a different location. This may prove impossible if the only suitable alternative property sites are owned by the railroad which is the lessor of the existing facility. Under these circumstances, there is little economic incentive for the railroad to make alternative property sites available to [Amtrak].

[21] The Amtrak Improvement Act also amended Section 305 of the RPSA, 45 U.S.C. § 545 (Br. App. 3a), by adding a subsection (d) to that provision which permitted Amtrak, in a federal court proceeding, to condemn *non-railroad* property for the construction of tracks and other facilities "necessary to provide intercity railroad passenger service." *See* Pub. L. No. 93-146, § 6, 87 Stat. at 550. Like Section 402(d), Section 305(d) was amended by the 4R Act in 1976 to eliminate the requirement that non-rail property sought to be condemned thereunder be "for construction of tracks and other facilities." *See* 90 Stat. at 125.

> The result may be that Amtrak cannot acquire property it needs at a reasonable price. Because of the relatively inflexible site requirements of property [Amtrak] would typically want to acquire, Amtrak could easily be put in a very disadvantageous bargaining position. It is precisely for this reason that railroads have generally been granted the power of eminent domain under State law. Giving [Amtrak] the power of eminent domain, coupled with the ability to seek conveyance of property through the Commission under this section, will insure that Amtrak can acquire the property necessary to perform its public service mission at a reasonable price.

S. Rep. No. 226, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2324, 2327 (emphasis added).

The court of appeals cited this legislative history, and quoted it in part (*see* Pet. App. 16a-17a), but the court ignored its plain meaning. The quoted passage acknowledges that a leasehold (*e.g.*, trackage rights obtained under Section 402(a)) "may not be the most economical means by which Amtrak could fulfill its requirements[.]" And the quoted passage makes it clear that Congress wanted to give Amtrak the power of eminent domain so that, "through the Commission" Amtrak could assess and accommodate its own needs in circumstances where its need for specific property leaves it with little bargaining power. The passage is in complete harmony with the Commission's conclusion that Amtrak has the statutory authority to "elect" to condemn a fee interest in another railroad's

track when it needs to use the track in connection with provision of passenger service, irrespective of whether trackage rights in that same line might be acquired under Section 402(a).

The passage does not, of course, refer to Amtrak's right to reconvey property acquired under Section 402(d). The legislative history of the pre-1990 Section 402(d) is silent as to any Congressional intent on that point. But there was no basis for the court of appeals' suggestion that the legislative history of Section 402(d) supported its conclusion that the Commission's reading of the statute had to be overturned.

3. The Structure Of Section 402 As A Whole

The court of appeals also said it had considered "the structure of Section 402" as a whole, Pet. App. 16a, and particularly "the interplay between subsections (a) and (d)" in construing the statute. *Id.* at 22a. But the interplay the court found is illusory: Section 402(d) was indeed adopted because Amtrak's other means of obtaining the use of tracks and other facilities might in various circumstances be inadequate or uneconomical, but neither the language nor the legislative history of Section 402(d) suggests in any way that a showing of inadequacy of other means is a prerequisite to invocation of Section 402(d). As the legislative history shows, the Commission ruled correctly that Section 402(d) contemplates a remedy for Amtrak which is separate, and was clearly intended by Congress to be distinct, from the pre-existing remedy available under Section 402(a).

The court of appeals also ruled that an interpretation of Section 402(d) that permitted Amtrak to condemn rail property in which it did not intend to retain an ownership interest would contradict a sup-

posed policy against "cross-subsidization". The court did not identify any applicable bar to cross-subsidization,[22] but in any event, there is no cross-subsidization here. B&M received "just compensation", determined by the Commission subject to judicial review, as well as trackage rights; Amtrak and the State of Vermont paid more than $4 million for rehabilitation of the B&M segment; and CV entered voluntarily into a transaction economically acceptable to it.[23] Neither B&M nor Central Vermont was "subsidizing" Amtrak in any way.

---

[22] The court cited a case decided under the Interstate Commerce Act, 49 U.S.C. § § 10101a *et seq.*, without explaining its relevance to this case. *See General American Transp. Co. v. ICC*, 872 F.2d 1048 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1069 (1990). Section 402(a)(2) of the RPSA contains a prohibition against cross-subsidization, but that provision is applicable only to Commission determinations made in the situation where *Amtrak* owns a rail line that is being used jointly with a freight railroad, and the Commission is required to determine the amount of compensation the freight railroad is required to pay Amtrak. That provision has no relevance here. The more general approach of the RPSA is reflected in Section 102 (as amended) of the RPSA, 45 U.S.C. § 501a(2), wherein Congress encourages "the private sector to share in the cost of operating rail passenger service. . . ." *See also* 45 U.S.C. § 501a(10).

[23] Central Vermont owned the segments of the Connecticut River Line adjacent to both ends of the B&M segment, and provided substantial freight service over the Line. The deterioration of the B&M segment had a significant detrimental impact on this freight service, and increased Central Vermont's operating expenses. Unlike B&M, Central Vermont had no parallel freight route to which it could carry traffic. Thus, Central Vermont had substantial business justifications to acquire, rehabilitate and maintain the B&M segment. The Commission expressly found that Central Vermont's acquisition would not adversely affect B&M's competitive interests. *See* Pet. App. 84a. In ad-

B. The Commission's Interpretation Of Section 402(d) Was Entitled to Deference Under *Chevron*

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court articulated the principles governing judicial review of an agency's interpretation of a statute it administers. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43 (footnote omitted). But if the Congressional intent is not clear and unambiguous, then "the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation." *Id.* at 843. Rather, the reviewing court's function is to determine whether the agency's interpretation of the statute reflects a "permissible construction". If so, the reviewing court is bound by that reading, even if the court would have construed the statute differently "if the question initially had arisen in a judicial proceeding." *Id.* at 843 n.11, 844.

The majority below acknowledged *Chevron* (Pet. App. 16a) and then rejected the ICC's interpretation

dition, the uncontroverted factual evidence before the Commission indicates that Central Vermont maintains *all* of its main freight lines to the F.R.A. "Class 3" standard—*i.e.*, in a condition suitable for high-speed passenger trains. *See, e.g.*, Maas Reb. V.S., J. App. 118 ("Unlike B&M, CV does not regard Amtrak's maintenance requirements to be 'unique' or unjustified for freight operations. We maintain our entire main line at FRA Class [3], even in areas where Amtrak has never operated. . . ."); *see id.*, J. App. 125. The fact that Central Vermont's maintenance of the segment in a manner consistent with its own preexisting practices would also preserve the conditions required by Amtrak for its *Montrealer* service does not amount to a "cross-subsidy" of Amtrak.

on the ground that Congressional intent was "unambiguous[ly]" to the contrary. But as the preceding argument makes clear, the majority was simply making an end run around the principle of deference to agency interpretation, preferring its own reading of the statute to the ICC's and then labelling its reading "unambiguous". Nothing in the statute or its legislative history indicates, unambiguously or otherwise, that the Commission must second-guess Amtrak and hold Amtrak to the minimum interest it thinks will meet Amtrak's needs, or that it must refuse to convey any interest Amtrak does not intend to keep. The statute and the legislative history are silent on any such limits. To the extent that "Congress has directly spoken to the *precise* question at issue," *Chevron*, 467 U.S. at 842 (emphasis added), it has made it clear that Amtrak is to have what the Commission called an "election of remedies" (Pet. App. 116a) to obtain the interest in rail properties it determines it needs to provide intercity rail passenger service on an efficient, cost-effective basis, with a requirement of just compensation and the participation of the Commission to protect other parties.

Under *Chevron*, the court of appeals' sole function with respect to the interpretation of the statute was to determine whether the Commission's interpretation was "permissible". 467 U.S. at 843. In fact, the Commission applied Section 402(d) precisely as it is written. It made a threshold determination that Amtrak and B&M were "unable to agree" on terms for the voluntary sale of the Connecticut River Line, as the statute requires. It determined that Amtrak sufficiently articulated a "need" for the B&M segment—*i.e.*, that Amtrak needed to use the segment in its

provision of intercity rail passenger service—and it considered the evidence of record with regard to each of the two statutory conditions that would have to be met to overcome Amtrak's presumptive right to have the property conveyed. There is nothing remotely *impermissible* about the Commission's construction of the statute, and the court of appeals was obliged to defer to it.

C. Any Doubts As To The Correctness Of The Commission's Interpretation of Section 402(d) Were Definitively Resolved By the 1990 Amendment

After the initial decision below, Congress took prompt action. In the Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, 104 Stat. 4654, Congress amended Section 402(d)(1) by adding the following sentence at the end of the existing text: "[Amtrak] may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of [the RPSA]." Pub. L. No. 101-641, § 9(a), 104 Stat. at 4658 (emphasis added). Br. App. 12a.

Congress made it clear that the amendment was to be applied to the present case, which was still before the court below on the petitions for rehearing filed by Amtrak and Central Vermont, the Commission, and others: "The amendment . . . shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment)." *Id.*, § 9(b) (emphasis added).

The legislative history of the 1990 Amendment makes it clear that (i) Congress wanted the amendment applied to this case, (ii) Congress believed the

court below had "misconstrued" the statute, (iii) Congress wanted to leave the structuring of the passenger rail system to Amtrak's "considered discretion," and (iv) Congress wanted it understood that Amtrak may exercise "its eminent domain authority" and then "convey interests in condemned property" in furtherance of its statutory purpose. The sponsor of the legislation, Senator Jeffords, spoke plainly:

> A recent court decision has jeopardized the continued operation of Amtrak's only passenger train to Vermont by restricting its eminent domain authority. The new provision makes clear that the court misconstrued that authority when it questioned Amtrak's subsequent conveyance of the rail line it acquired.
>
> * * *
>
> This amendment clarifies that, with this and any future case, Amtrak can convey interests in condemned property to a third party when such conveyance furthers Amtrak's statutory purpose under the Rail Passenger Service Act, as it did in the Montrealer situation. This leaves the structuring of the nationwide rail passenger system to Amtrak's considered discretion, as the Rail Passenger Service Act intends.

See 136 Cong. Rec. S17668 (daily ed. October 27, 1990).

Where Congress alters an existing statute while a case involving interpretation of the statute is on appeal, the amendment is applicable to the pending case if Congress so intends. *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827 (1990).

Here, there was no doubt that Congress intended that the amendment "shall apply" to pending cases.

The court of appeals nevertheless denied rehearing, ignoring not only Congress' evident desires with respect to the present case but also the plain meaning of the amendment. The court said:

> The new language plainly authorizes Amtrak to convey property *subsequent to* a condemnation that is otherwise valid under section 402(d)(1). *It does not affect the requirement that the property that is subsequently conveyed may not be condemned in the first place if it is not "required for intercity rail passenger service."* The court construed section 402 to preclude Amtrak from resorting to its subsection (d) power to effect an outright change in ownership between competing railroads if it could instead achieve the objective necessary for passenger service by [condemning] a lesser interest or by using its subsection (a) power.

Pet. App. 3a (emphasis in original and added). In other words, according to the court, a subsequent conveyance of a condemned property is permissible if, but only if, Amtrak was not planning the subsequent conveyance at the time of the condemnation, because any such plan would show a lack of "need" and invalidate the condemnation.

With all respect, the clear intention of the amendment was to validate condemnations where Amtrak *does* intend a prompt reconveyance. First, the statute was intended to correct the result in *this* case, in which a reconveyance was an explicit part of the plan.

However much the panel majority may have disliked being dictated to by Congress during the pendency of the case, the court had no right, in the course of interpreting the 1990 amendment, to disregard the circumstances that prompted Congress to adopt it. Second, the court of appeals' interpretation robs the amendment of virtually all of its meaning. If a conveyance to Amtrak under Section 402(d) is invalid "in the first place" to the extent that Amtrak plans to reconvey the property, then the amendment applies only where Amtrak has a post-condemnation change of circumstances or change of heart, and the amendment states only the obvious fact that Amtrak is not required to keep such property forever. Congress clearly did not intend such a wholly unnecessary declaration.[24] What it did intend was to confirm that Amtrak may indeed seek conveyance of interests in property that it does not intend to keep, and thereby correct the mistake made below when, in Senator Jefford's words, "the court misconstrued [Amtrak's] authority" in this very case.[25]

---

[24] The Ifterstate Commerce Act already provides authority for railroads, including Amtrak, to transfer lawfully acquired rail property to other carriers, *see* 49 U.S.C. § 11343 (1988).

[25] The amendment provides that the Commission must find that the reconveyance furthers the purposes of the RPSA. The Commission had, of course, already so found here. See Pet. App. 44a-45a ("Amtrak has established that its interest in having the line conveyed is so that it may reinstitute its Montrealer passenger service—clearly a 'public purpose.'"). *See also* 136 Cong. Rec. S17668 (daily ed. October 27,1990) (statement of Sen. Jeffords) (Amtrak entitled to reconvey condemned property when reconveyance furthers purposes of the RPSA, "as it did in the Montrealer situation").

D. No Genuine Constitutional Question Is Presented By the Commission's Interpretation Of Section 402(d)

The court of appeals suggested that its rejection of the Commission's reading of Section 402(d) was required in order to avoid a constitutional question:

> Although we do not reach B&M's constitutional argument that the forced conveyance approved by the ICC violated the public use requirement of the Takings Clause, we note that there are at least colorable Fifth Amendment problems with the statute as interpreted by the Commission.

Pet. App. 21a.

But there is no serious "public use" question here. As the Commission recognized, the overall transaction served the "public purpose" of achieving "modern, cost-efficient, and energy-efficient intercity railroad passenger service," 45 U.S.C. § 501(a). See Pet. App. 44a-45a. The court below acknowledged (Pet. App. 21a) that this Court's decisions construing the words "public purpose" in the Fifth Amendment have validated takings for reconveyance to a private third party when they further a legislatively articulated public interest. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984); *Berman v. Parker*, 348 U.S. 26 (1954). That should have been the end of the matter. As this Court stated in *Midkiff*, "it is only the taking's purpose, and not its mechanics, that must pass scrutiny under the Public Use Clause." 467 U.S. at 244.[26]

[26] In the analogous case of *National Railroad Passenger Corp. v. Two Parcels of Land*, 822 F.2d 1261 (2d Cir.), *cert. denied*, 484 U.S. 954 (1987), the Second Circuit rejected a constitutional challenge to an Amtrak condemnation and reconveyance of property. In *Two Parcels*, Amtrak forcibly acquired a fee interest in non-rail property pursuant to Section 305(d) of the RPSA, 45 U.S.C. § 545(d), with the intention of reconveying the property to the City of New London, Connecticut, which would construct a service road on the property adjacent to Amtrak-owned rail lines and grant Amtrak a permanent easement thereon. Rejecting the condemnee's argument that Amtrak's exercise of its condemnation power was unconstitutional, the court stated that "New London's grant of a permanent easement to Amtrak for inspection/maintenance purposes, the exercise of which may periodically close the road to the public, demonstrates the significant relationship between the condemned property and the provision of intercity rail passenger service." 822 F.2d at 1265.

If the court below believed that there were "colorable Fifth Amendment problems" that need not be addressed absent a "clearer statement" of Congress' intent to allow Amtrak to reconvey condemned property to a third party, it apparently did not believe those problems to be substantial enough to merit discussion on rehearing after Congress provided such a statement with the 1990 amendment.[27] Clearly, the Fifth Amendment's "public purpose" requirement imposed no impediment to the transaction approved by the Commission.

[27] Judge Ginsburg, in her separate statement on rehearing, confirmed that she was without doubt as to the constitutionality of the statute: "Furthermore, current Supreme Court precedent, as I comprehend it, does not cast constitutional doubt on the legislature's measure." Pet. App. 4a (citation omitted).

II. THE INTERSTATE COMMERCE COMMISSION CORRECTLY DETERMINED THAT BOSTON & MAINE DID NOT MAKE EITHER OF THE TWO SHOWINGS IT HAD TO MAKE TO OVERCOME THE STATUTORY PRESUMPTION IN FAVOR OF THE CONVEYANCE TO AMTRAK

Section 402(d) provides that the Commission "shall order" the conveyance of property to Amtrak unless it finds *both* that the conveyance would "significantly impair" the ability of the conveyor railroad to carry out its obligations as a common carrier *and* that Amtrak's obligations "can adequately be met by the acquisition of alternative property (including interests in property)."[28] This is an extremely strong statutory command in Amtrak's favor: an objector must persuade the Commission on both points; each point contains an adverb ("significantly" impair; "adequately" be met) that inclines in favor of Amtrak and against the objector; even if the objector persuades the Commission on both points, this only removes the presumption in favor of the transaction; but if the objector fails on either point, the Commission is unequivocally compelled to order the conveyance.

---

[28] The Conference Report regarding the enactment of Section 402(d) explained:

> Amtrak's need for the property would be deemed to be established, and the Commission would be required to order the conveyance, unless it found that such conveyance would significantly impair the ability of the railroad to carry out its obligations as a common carrier and that Amtrak's obligations to provide rail passenger service could be met by the acquisition of alternative property[.]

Conf. Rep. No. 587, 93d Cong., 1st Sess. 4 (1973), *reprinted in* 1973 U.S. Code Cong. & Admin. News 2331, 2338.

In the present case, the Commission, based on the record, found against the objector (B&M) on both points. Pet. App. 45a-46a. The court of appeals rejected the Commission's findings on both issues, Pet. App. 18a-21a, but did so only in light of its erroneous view of what findings the statute actually requires.

A. The Commission Correctly Concluded That B&M Failed To Prove That Amtrak Had An Adequate Alternative

The Commission's Final Decision first discusses Section 402(d)(1)(B), which as applied to this case asks whether Amtrak's needs in relation to the resumption of *Montrealer* service could "adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to [Amtrak], or available to [Amtrak] by the exercise of its authority under [45 U.S.C. § 545(d)]." The Commission interpreted "alternative property" to mean property *in another location* and rejected the alternative routes that B&M suggested. Pet. App. 45a-46a. The court of appeals refused to accept this reading of the statute and, in a variation of its earlier theme, said that the Commission should have determined whether a lesser interest in *the B&M segment* would have met Amtrak's needs. Pet. App. 19a-20a.

There are two fundamental errors in the court's response. First, the court was once again improperly substituting its reading of the statute for the Commission's. The Commission reasonably interpreted the statute to refer to property in another location, to give Amtrak a choice of remedies, not to give the Commission the task of identifying the least interest in the B&M segment itself that Amtrak could get by with, and the Commission's interpretation was enti-

tled to deference. Second, subparagraph (B) speaks *only* of adequate alternative rail property "available for sale on reasonable terms" or *non-rail* property available by means of condemnation under a separate section, 45 U.S.C. § 545(d) (Br. App. 3a). There was no lesser interest in the B&M segment adequate for Amtrak's purposes and "available for sale on reasonable terms". No interest in the B&M segment was subject to condemnation under Section 545(d); nor was there any other alternative property meeting the requirements of subparagraph (B). Nothing in the provision suggests even that the Commission *may* (let alone that it must) consider the alternative of condemning a "lesser interest" in the *rail* property that comprised the B&M segment.

B. The Commission Also Correctly Concluded That B&M Failed To Prove That Its Service Would Be Significantly Impaired

Section 402(d)(1)(A) requires an objector to prove that a conveyance would "significantly impair the ability of the railroad to carry out its obligations as a common carrier." The Commission found that B&M had not satisfied this test either:

> B&M is receiving just compensation for the property being conveyed and has the option of retaining its local traffic through a trackage rights agreement. Its ability to carry out its common carrier obligations over its entire system, and even to the shippers on the line conveyed, will not be impaired.

Pet. App. 46a.

Again, the majority below expressed dissatisfaction with the Commission's findings on this issue, and again, its criticism of the Commission rests on a con-

ception of the statute that is both inconsistent with the deference due to the ICC and wrong. First, the majority asserts that the Commission was not entitled to dismiss B&M's "explicit claim of significant impairment" based on an assumption that B&M "will be adequately protected by the terms of a trackage rights agreement dictated by its competitor, Central Vermont." Pet. App. 19a. But it was the *Commission*, not Central Vermont, that had the power to, and did, define the terms and conditions of B&M's trackage rights so as to protect B&M's interests. Pet. App. 107a; *see National Railroad Passenger Corp.—Conveyance of Boston and Maine Corp. Interests In Connecticut River Line in Vermont and New Hampshire*, 7 I.C.C.2d 539 (1990).

The majority then states that the Commission's application of subparagraph (A) was erroneous because "the statute provides that the Commission's finding on impairment focus on the 'conveyance of the property to [Amtrak]' and not on *post hoc* remedies aimed at ameliorating the impairment[.]" Pet. App. 19a. This analysis is simply wrong. Neither the text, which instructs the Commission to order a conveyance to Amtrak "on reasonable terms and conditions," nor common sense suggests that the Commission must separate the conveyance from the conditions and determine whether the conveying railroad would be significantly affected by a hypothetical conveyance that was *not* subjected to the conditions the Commission is, in fact, imposing.

CONCLUSION

For all of the foregoing reasons, the decision of the court of appeals should be reversed and remanded with instructions to affirm the Commission's decision with regard to the conveyance issues.

Respectfully submitted,

LOUIS R. COHEN
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

STEPHEN C. ROGERS
FREDERICK C. OHLY
NATIONAL RAILROAD PASSENGER CORPORATION
60 Massachusetts Avenue, N.E.
Washington, D.C. 20002
(202) 906-3985

ROBERT P. VOM EIGEN,
Counsel of Record
CHARLES I. APPLER
THEODORE A. HOWARD
RICHARD F. RILEY, JR.
HOPKINS & SUTTER
888 Sixteenth Street, N.W.
Washington, D.C. 20006
(202) 835-8000

Counsel for Petitioners

Dated: November 21, 1991

APPENDIX

45 U.S.C. § 501a. Goals

The Congress hereby establishes the following goals for Amtrak:

(1) Exercise of the Corporation's best business judgment in taking actions to minimize Federal subsidies, including increasing fares, increasing revenues from the carriage of mail and express, reducing losses on food service, improving its contracts with operating railroads, reducing management costs, and increasing employee productivity.

(2) Encouragement of State, regional, and local governments and the private sector to share the costs of operating rail passenger service, including the costs of operating stations and other facilities, in order to minimize Federal subsidies.

(3) Improvement of the number of passenger miles generated systemwide per dollar of Federal funding by at least 30 percent within the two-year period beginning on October 1, 1981.

(4) Elimination of the deficit associated with food and beverage services by September 30, 1982.

(5) Implementation of strategies to achieve immediately maximum productivity and efficiency consistent with safe and efficient service.

(6) Operation of Amtrak trains, to the maximum extent feasible, to all station stops within 15 minutes of the time established in public timetables for such operations.

(7) Development of service on rail corridors, subsidized by States or private parties, or both.

(8) Implementation of schedules which provide a systemwide average speed of at least 60 miles per hour, and which can be adhered to with a degree of reliability and passenger comfort.

(9) Improvement of the feasibility of State-subsidized service through the use of technical assistance panels to coordinate, plan, and implement such service.

(10) Encouragement of rail carriers to assist in improving intercity rail passenger service.

(11) General improvement of Amtrak's performance through comprehensive, systematic operational programs and employee incentives.

(12) Implementation of policies ensuring equitable access to the Northeast Corridor by both intercity and commuter services.

(13) Coordination among the various uses of the Northeast Corridor, particularly intercity and commuter passenger services.

(14) Amtrak's maximization of the use of its resources, including the most cost-effective use of employees, facilities, and real estate. Amtrak is encouraged to enter into agreements with the private sector and undertake initiatives which are consistent with good business judgment and designed to maximize its revenues and minimize Federal subsidies.

45 U.S.C. § 545. General powers

(d) Acquisition of property; declaration of taking; property compensation; procedures; transfer of title

(1) The Corporation is authorized, to the extent financial resources are available—

> **(A)** to acquire any property which the Secretary, acting in furtherance of his responsibility to design and construct and intermodal transportation terminal at Union Station in the District of Columbia, requests, upon assurance of full reimbursement by the Secretary; and
>
> **(B)** to acquire any right-of-way, land, or other property (except right-of-way, land, or other property of a railroad or property of a State or political subdivision thereof or of any other governmental agency), which is required [for] intercity rail passenger service;

by the exercise of the right of eminent domain, in accordance with the provisions of this subsection, in the district court of the United States for the judicial district in which such property is located or in any such court if a single piece of property is located in more than one judicial district: *Provided*, That such right may only be exercised when the Corporation cannot acquire such property by contract or is unable to agree with the owner as to the amount of compensation to be paid.

(2) The Corporation shall file with the complaint, or at any time before judgment, a declaration of taking containing or having annexed thereto—

> **(A)** a statement of the public use for which the property is taken;
>
> **(B)** a description of the property taken sufficient for the identification thereof;
>
> **(C)** a statement of the estate or interest in the property taken;

(D) a plan showing the property taken; and

(E) a statement of the amount of money estimated by the Corporation to be just compensation for the property taken.

(3) Upon the filing of the declaration of taking and the depositing in the court of the amount of money estimated in such declaration to be just compensation for the property, the property shall be deemed to be condemned and taken for the use of the Corporation. Title to such property shall thereupon vest in the Corporation in fee simple absolute or in any lesser estate or interest specified in the declaration of taking, and the right to the money deposited as estimated just compensation shall immediately vest in the persons entitled thereto. The court, after a hearing, shall make a finding as to the amount of money which constitutes just compensation for such property and shall make an award and enter judgment accordingly. Such judgment shall include, as part of the just compensation awarded, interest on the amount finally awarded as the value of the property on the date of taking minus the amount deposited in the court on such date, at the rate of 6 per centum per annum from the date of taking to the date of payment.

(4) Upon the application of the parties in interest, the court may order that the money deposited in the court, or any part thereof, be paid forthwith for or on account of the just compensation to be awarded in the proceeding. If the compensation finally awarded exceeds the amount of the money received by any person entitled to compensation, the court shall enter judgment against the Corporation for the amount of the deficiency.

(5) Upon the filing of a declaration of taking, the court may fix the time within which, and the terms upon which, the parties in possession are required to surrender possession to the Corporation. The court may make such or-

ders in respect to encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

45 U.S.C. § 562. Facilities and service agreements

(a) Contracts with railroads or regional transportation agencies; authority of Interstate Commerce Commission; fixing of compensation; agreements with State, local or regional transportation agencies; disagreement procedures; criteria for compensation

(1) The Corporation may contract with railroads or with regional transportation agencies for the use of tracks and other facilities and the provision of services on such terms and conditions as the parties may agree, which terms shall include a penalty for untimely performance. In the event of a failure to agree, the Interstate Commerce Commission shall, within ninety days after application by the Corporation, if it finds that doing so is necessary to carry out the purposes of this chapter, order the provision of services or the use of tracks or facilities of the railroad by the Corporation, on such terms and for such compensation as the Commission may fix as just and reasonable, and the rights of the Corporation to such services or to the use of tracks or facilities of the railroad or agency under such order or under an order issued under subsection (b) of this section shall be conditioned upon payment by the Corporation of the compensation fixed by the Commission. In fixing just and reasonable compensation for the provision of services or for the use of tracks and facilities ordered by the Commission under the preceding sentence, the Commission shall, in fixing compensation in excess of incremental costs, consider quality of service as a major factor in determining the amount (if any) of such compensation. If the amount of compensation fixed is not duly and promptly paid, the railroad or agency entitled thereto may bring an action against the Corporation to recover the amount properly owed.

(2) Notwithstanding any other provision of this chapter, the Corporation may enter into agreements with any other

railroads and with any State (or local or regional transportation agency) responsible for providing commuter rail or rail freight services over tracks, rights-of-way, and other facilities acquired by the Corporation pursuant to authority granted by the Regional Rail Reorganization Act of 1973 [45 U.S.C.A. § 701 et seq.] and the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C.A. § 801 et seq.]. In the event of a failure to agree, the Commission shall order that rail services continue to be provided, and it shall, consistent with equitable and fair compensation principles, decide, within 120 days after the date of submission of a dispute to the Commission, the proper amount of compensation for the provision of such services. The Commission, in making such a determination, shall not permit cross subsidization between intercity rail passenger service and rail freight services. The Commission, in making such a determination, shall assign to a freight railroad obtaining services pursuant to this paragraph the costs incurred by the Corporation solely for the benefit of that railroad, plus a proportionate share of all other costs of providing services covered by this paragraph that are incurred for the common benefit of the Corporation and such freight railroad. The proportionate share of such other costs assigned to a freight railroad shall be based on relative measures of volume of car operations, tonnage, or other factors that reasonably reflect the relative use of the rail properties covered by this paragraph. Nothing in this paragraph shall be construed to preclude parties from entering into an agreement under this paragraph either before or after a determination of the Commission under this paragraph.

(b) Immediate availability of tracks and other facilities

To facilitate the initiation of operations by the Corporation within the basic system, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities. The Com-

mission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable.

(c) Emergency measures

To facilitate such operations by the Corporation as may be deemed by it to be necessary in an emergency, the Commission shall, upon application by the Corporation, require a railroad to make immediately available tracks and other facilities for the duration of such emergency. The Commission shall thereafter promptly proceed to fix such terms and conditions as are just and reasonable including indemnification of the railroad by the Corporation against any casualty risk to which it may be exposed.

(d) Disagreement procedures

(1) If the Corporation and a railroad are unable to agree upon terms for the sale to the Corporation of property (including interests in property) owned by the railroad and required for intercity rail passenger service, the Corporation may apply to the Commission for an order establishing the need of the Corporation for the property at issue and requiring the conveyance thereof from the railroad to the Corporation on reasonable terms and conditions, including just compensation. Unless the Commission finds that—

(A) conveyance of the property to the Corporation would significantly impair the ability of the railroad to carry out its obligations as a common carrier; and

(B) the obligations of the Corporation to provide modern, efficient, and economical rail passenger service can adequately be met by the acquisition of alternative property (including interests in property) which is available for sale on reasonable terms to the Corporation, or available to the Corporation by the exercise of its authority under section 545(d) of this title;

the need of the Corporation for the property shall be deemed to be established and the Commission shall order the conveyance of the property to the Corporation on such reasonable terms and conditions as it may prescribe, including just compensation.

(2) The Commission shall expedite proceedings under this subsection and, in any event, issue its order within one hundred and twenty days from receipt of the application from the Corporation. If just compensation has not been determined on the date of the order, the order shall require, as part of just compensation, interest at the rate of 6 per centum per annum from the date prescribed for conveyance until just compensation is paid.

(e) Preferences for intercity or commuter passenger trains

(1) Except in an emergency, intercity or commuter passenger trains operated by or on behalf of the Corporation shall be accorded preference over freight trains in the use of any given line of track, junction, or crossing, unless the Secretary has issued an order to the contrary in accordance with paragraph (2) of this subsection.

(2) Any railroad whose rights with regard to freight train operation are affected by paragraph (1) of this subsection may file an application with the Secretary requesting appropriate relief. If, after hearing under section 553 of Title 5, the Secretary finds that adherence to such paragraph (1) will materially lessen the quality of freight service provided to shippers, the Secretary shall issue an order fixing rights of trains, on such terms and conditions as are just and reasonable.

(f) Accelerated speeds

If, upon request of the Corporation, a railroad refuses to permit accelerated speeds by trains operated by or on behalf of the Corporation, the Corporation may apply to the Secretary for an order requiring the railroad to permit

such accelerated speeds. The Secretary shall make findings as to whether such accelerated speeds are unsafe or otherwise impracticable, and with respect to the nature and extent of improvements to track, signal systems, and other facilities that would be required to make such accelerated speeds safe and practicable. After hearing, the Secretary shall issue an order fixing maximum permissible speeds of Corporation trains, on such terms and conditions as he shall find to be just and reasonable.

(g) Operation of additional trains

Upon receipt of an application from the Corporation in any situation where the Corporation is unable to obtain a satisfactory, voluntary agreement from a rail carrier for operation of additional trains on the rail lines of that rail carrier, the Secretary may, after a hearing on the record, order such rail carrier, within 60 days, to permit or provide requested operation of trains of the Corporation over such rail lines on schedules based upon legally permissible operating times. If the Secretary determines not to hold a hearing, the Secretary, within 30 days after receipt of an application from the Corporation, shall publish in the Federal Register his reasons for not holding a hearing. Any such hearing must include a consideration of whether such an order would unduly impair freight operations of the rail carrier involved, and the burden shall be on the rail carrier seeking to oppose the operation of an additional train to demonstrate that the requested operation will impair freight operations. In establishing such scheduled running times, the Secretary shall give proper consideration to the statutory goal that the Corporation shall implement schedules which will attain a system-wide average speed of at least 55 miles per hour which can be adhered to with a high degree of reliability and passenger comfort. The compensation payable by the Corporation to a rail carrier for an operation ordered pursuant to this subsection shall be that which is properly established pursuant to an agreement between the Corporation and such rail

carrier, or, in the absence of an applicable agreement, shall be determined by the Commission in a proceeding pursuant to subsection (a) of this section.

The Independent Safety Board Act Amendments of 1990, Pub. L. No. 101-641, § 9, 104 Stat. 4654, 4658 (November 28, 1990)

Section 9(a). Section 402(d)(1) of Rail Passenger Service Act (45 U.S.C. § 562(d)(1)) is amended by adding at the end the following new sentence:

> "The Corporation may subsequently convey title or other interest in such property to a third party, if such reconveyance is found by the Commission to further the purposes of this Act.".

(b) The amendment made by subsection (a) shall apply to any proceeding instituted before, on, or after the date of enactment of this Act (including any such proceeding pending before any Federal court on such date of enactment).